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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ADAM GENE SON, Defendant and Appellant.	E047063 (Super.Ct.No. SWF025273) OPINION

APPEAL from the Superior Court of Riverside County. Edward D. Webster, Judge. Affirmed with directions.

Kathleen Woods Novoa, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Adam Son, of rape of an intoxicated person. (Pen. Code, § 261, subd. (a)(3).)[1] In bifurcated proceedings, the trial court found that he had suffered a prior strike conviction (§ 667, subds. (c) & (e)). He was sentenced to prison for 12 years and appeals, claiming the evidence was insufficient to support his conviction and sentencing error occurred. We reject his contentions, save for his assertion that the sentencing court erred in calculating his credits. Based on the agreement of the parties, we direct the trial court to amend the minutes of the sentencing hearing and the abstract of judgment to reflect the proper calculation of credits. Otherwise, we affirm.

FACTS

On June 25, 2007, the victim and her female friend were at a travel trailer, occupied by defendant's male friend, which was parked next to a house occupied by defendant. The victim met defendant for the first time that evening. All four were drinking, although defendant drank less than the rest. After five hours of drinking, the victim's female friend had already gotten sick and passed out outside the trailer and defendant's male friend had passed out and the victim had gotten violently ill before passing out herself, both on the bed inside the trailer. The victim awoke during the night to defendant having intercourse with her, while defendant's male friend was still passed out on the bed. The victim head-butted defendant and kicked him, then passed out again. When she awoke at 5:00 a.m., defendant was gone and the victim reported the crime to her female friend and to defendant's male friend.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

ISSUES AND DISCUSSION

1. *Insufficiency of the Evidence*

Defendant contends there was insufficient evidence to support his conviction of rape of an intoxicated person because the evidence did not prove that defendant knew or reasonably should have known that the effect of an intoxicating substance prevented the victim from resisting. Defendant asserts this is the case because he had been drinking that night, according to his friend, AND NO ONE ELSE WHO WAS PRESENT, the victim flirted with defendant,[2] according to another friend of defendant's, AND NO ONE ELSE PRESENT,[3] the victim called defendant to join her inside the trailer and both of these friends testified that the victim persuaded the defendant to go with her and her girlfriend to pick up more alcohol. First, even if the jury believed this testimony, these acts occurred long before the rape. Defendant never testified and no statements he made about his perceptions at the time of the crime were introduced at trial, therefore, the jury did not have before it any evidence out of defendant's mouth that he did not know or could not have reasonably known that the victim's state of intoxication was such that it prevented her from resisting him. There was no evidence how much alcohol defendant

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[2] This testimony was impeached by statements this friend made to an investigator from the district attorney's office a month after the crime that he passed out from consuming alcohol hours before the crime occurred and before that he saw no flirting, cuddling or physical contact between the victim and defendant.

[3] This witness testified to the presence outside the trailer of someone none of the other witnesses mentioned was there that night, including the victim. This person was supposed to have been a friend of the victim's. This witness also offered an alibi, claiming defendant spent the night on the couch inside the house adjoining the trailer.

consumed that night[4] and no testimony, either lay or expert, about what affect, if any, it had or might have had on him. No intoxication instructions were requested by defendant and none were given. Therefore, what the jury was left with was the testimony of the five-foot-two-inch, 120 pound victim that she was on her period that night and was wearing a sanitary pad, that she drank so much that she became ill and was either carried to or escorted to the bed in the back of the trailer by defendant, who got her a bucket at her request and held it for her as she vomited into it, while he held her hair and rubbed her back. She then passed out and awoke some time later to defendant raping her while her pants and underpanties were down around her knees.[5, 6]

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[4] In fact, the victim testified that defendant had not had as much to drink as she, her girlfriend and defendant's male friend had had.

[5] She also testified that the closure to her pants had been ripped during the crime and the jury was shown those pants.

[6] In connection with this contention, appellate counsel additionally states, " . . . [T]h[is] Court does have a limited discretion to reject witness testimony: [¶] A question at law is presented which authorizes an appellate court in setting aside a verdict, if the testimony relied upon by the prosecution is apparently so improbable or false as to be incredible and to amount to no evidence at all. If it is of this character, the court is justified in assuming that the verdict obtained was the result of passion or prejudice . . . . To authorize a reversal under this rule, the improbability must appear very plainly. [Citation.] [¶] A review of the entire record in this appeal will reveal that the evidence was insufficient to sustain the charge, and that the verdict rendered was a result of passion or prejudice and must be rejected." However, appellate counsel fails to state what testimony was incredible or amounted to no evidence at all and how this is so. We, on the other hand, have reviewed the entire record and conclude that the evidence supporting the conviction is quite strong and if any testimony may be viewed as incredible or amounting to none at all it is the testimony of defendant's two friends.

2. *Sentencing*

a. Denial of Defendant's *Romero*[7] Motion

The sentencing court noted that in 1999 defendant had been convicted of assault by means of force likely to cause great bodily injury and a true finding had been made in connection with that crime that defendant inflicted great bodily injury. The court said, "[W]e had a short discussion and I indicated that in my view having an eight-year gap between two violent felon[ies] [(the prior aggravated assault and the current rape)] is probably not what's contemplated by *Romero*. Usually you see the *Romero* motion where the second offense is second-degree burglary or petty theft with a prior and you're dealing with strikes where he could face 25 years to life. [¶] Rarely in my experience is a prior felony where a person has been found to have inflicted great bodily injury stricken where the new offense is a rape case, especially where the . . . separation between the two offenses is only eight years as opposed to 30 or 40 years. So I indicated pretty strongly that I would deny the *Romero* motion. . . . [¶] . . . [Defense counsel] did advise that [the strike prior] was a situation where [defendant] was in custody and entered a plea of guilty to that offense where maybe there was some issue as to the great bodily injury. But . . . I have no evidence of any of that, and I take the conviction at its face value." Defense counsel conceded that "force and violence" were part of defendant's strike prior, but defendant did not use force in the current case.

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[7] *People v. Superior Court* (*Romero*) (1996) 13 Cal. 4th 497 (*Romero*).

Counsel also pointed out that defendant was 18 when he committed the strike prior, although he conceded that the eight years between the prior and the current offenses "is not 20 or 30 years." The court responded that defendant was also convicted in 1997, as a juvenile, of burglary. The court added, "Most people can go through their lives without being convicted of one felony, let alone three felonies . . . ." The court then denied the *Romero* motion.

Defendant contends that the sentencing court abused its discretion (*People v. Carmony* (2004) 33 Cal.4th 367, 374) in refusing to dismiss his strike. He concedes that the burden is on him to demonstrate that the sentencing court's denial of his motion was irrational or arbitrary. Defendant contends that the court's reason for not dismissing his strike was that it was not old enough. Defendant is incorrect. As noted above, the sentencing court pointed out that only eight years had elapsed since defendant had suffered his strike prior. However, the court also pointed out that at the age of 25, defendant stood convicted of three different serious felonies, the first, a first degree burglary defendant committed as a juvenile.[8] (§ 1192.7, subd. (c)(3), (8) & (18).) Defendant is fortunate he was not charged as a third striker here.

Defendant cites no authority holding that the sentencing court must consider the eight year span between the strike prior and the current offense weighing in his favor or that its denial of his motion is arbitrary and irrational. Clearly, the court was aware of the span. Defendant cites to no authority holding that such a lapse of time is a mitigating

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[8] See Probation Report, p. 12.

circumstance or mandates the granting of a motion to dismiss the prior. Moreover, there remains the circumstance that, by a relatively young age, defendant was a three time serious felony offender. Thus, the cases defendant cites discussing relatively minor priors or current offenses have no bearing here.

Defendant contends that the sentencing court may not consider solely his record in denying a motion to dismiss a strike. However, the court had before it the Probation Report and defendant's motion, both of which discussed factors in addition to his record to which defendant now draws our attention.[9] The court noted it had read both. Additionally, the parties and the court had a discussion off the record concerning this matter. Therefore, there is no support in the record for the assertion that the court did not consider factors other than defendant's record.

b. Presentence Credits

The sentencing court limited defendant's presentence credits to 15 percent under section 2933.1. The parties agree that this was error. Therefore, we will direct the sentencing court to amend the minutes of the sentencing hearing and the abstract of

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[9] For their part, the People call our attention to the facts that defendant did not complete high school, he had a history of violence and his employment and residential history were unstable, all factors the sentencing court cited in imposing the midterm. The sentencing court also found that defendant had engaged in violent conduct that indicated that he was a danger to society and his priors were numerous and of increasing seriousness.

In sentencing defendant, the trial court relied on the fact that his prior performance on parole or probation was satisfactory, a factor to which defendant now calls our attention.

judgment to omit any reference to section 2933.1 and to credit defendant with 64 days, for a total of 193 days.

DISPOSITION

The trial court is directed to amend the minutes of the sentencing hearing and the abstract of judgment to omit any reference to section 2933.1 and to note that defendant is credited with 64 days, for a total of 193 days. In all other respects, the judgment is affirmed.

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RAMIREZ
P.J.

We concur:

HOLLENHORST
J.

KING
J.